KADIR SALLEH

v.

CHE MERIAM YUSUF

HIGH COURT MALAYA, KOTA BHARU
ABDUL MALEK AHMAD J
[CIVIL SUIT NO. 272 OF 1984]
15 MARCH 1986

CONTRACT: *Sale of land - Sporadic payments - Time is of essence - Rescission of agreement - Waiver - By conduct - Revival of rights.*

LAND LAW *- Land - Transfer of title - Form 14A National Land Code.*

The plaintiff, a registered owner of land held under GM 755 Lot 896 Mukim Bayang, Daerah Panji, Kota Bharu, Kelantan, by an agreement dated 25 May 1982 had agreed to sell it to the defendant for RM135,000 payable at the times and in the manner and upon the terms and conditions stated therein. Time was to be of essence.

On 7 May 1983, when only RM65,000 had been paid by the defendant, the plaintiff transferred the title to the said land to the defendant. Further payments were made after that. Sometime in August 1984 the plaintiff sued the defendant for rescission of the said agreement.

As a defence the defendant contended that there was waiver by conduct.

Held:

Dismissing the application on the grounds that the time limit for payment in the agreement had been waived and never revived by the plaintiff.

[Order accordingly.]

Cases referred to:

Charles Rickards Ltd. v. Oppenhaim [1950] 1 KB 616
Lew Yew Hin v. Kow Lup Piow [1974] 1 MLJ 114
Siah Kwee Mow & Anor. v. Kulim Rubber Plantations Ltd. [1979] 2 MLJ 190

For the plaintiff - Hussin; M/s. Adhan, Husin & Zaidan
For the defendants - C. Jegathesan; M/s. C. Jegathesan

JUDGMENT

Abdul Malek Ahmad J:

By an agreement dated 25 May 1982, the plaintiff as registered owner of the land held under GM 755 Lot 896 Mukim Bayang, Daerah Panji, Kota Bharu, Kelantan, had agreed to sell it to the defendant for RM135,000 payable at the times and in the manner and upon the terms and conditions stated therein; RM12,000 was to be paid by way of deposit and RM13,000 on 2 June 1982 as part payment. The balance of RM110,000 was to be paid within one year of the agreement. According to the agreement, the deposit and the RM13,000 part payment were to be forfeited if the balance of RM110,000 was paid within one year and time was to be of the essence.

On 7 May 1983, only RM65,000 had been paid by the defendant towards the purchase price but the plaintiff transferred the title to the said land to the defendant by duly thumbprinting on the required Form 14A of the National Land Code to effect it. Further payments were made after that until some time in August 1984 when the plaintiff decided to sue the defendant

for a declaration that the said agreement had been duly rescinded or alternatively for a rescission of the said agreement, a declaration that the deposit of RM12,000 and a further sum of RM13,000 be forfeited to the plaintiff, that the defendant forthwith return the title documents of the said land to the plaintiff, alternatively the defendant to forthwith pay the plaintiff the balance of RM37,000, such further or other relief, damages, interest and costs.

In her statement of defence, the defendant stated that the time for performance of the agreement had been waived by the plaintiff subsequent to the signing of the agreement and the plaintiff had agreed to accept the RM37,000 balance in October 1984 (actually from the calculations, the balance to date is RM36,500 not RM37,000). The defendant did in fact send two cheques both dated 9 September 1984 totalling this amount but these were refused by the plaintiff's solicitors. In the result, the defendant counterclaimed for specific performance by the plaintiff of the said agreement, for an injunction against the plaintiff restraining him from doing any act in breach of the said agreement, for an order that the plaintiff accept the balance payment of RM37,000, for the caveat lodged by the plaintiff on the said land to be lifted alternatively for damages, for any other order the Court deemed fit and for costs.

In her testimony, the defendant agreed that although the agreement stipulated that she had to pay the balance of RM110,000 within one year and time was of the essence, she had not done so on 7 May 1983, which was about two weeks before that period expired, when the plaintiff signed over the land to her. Before the plaintiff thumbprinted the transfer before the Assistant District Officer, who had explained it to him, the defendant said she had paid another RM10,000 to the plaintiff in front of DW2 thereby totalling her payments to the balance sum on that date to RM40,000. She had paid RM5,000 on 6 November 1982 and RM25,000 on 30 April 1983. The defendant also said that the plaintiff had wanted the RM10,000 as he was going to Mecca that month. She had then asked him what would happen if anything happened to him in Mecca as the agreement would lapse and the defendant had by then in fact paid RM65,000. The defendant said she suggested to the plaintiff that he should sign the transfer form to the land but if she did not pay the balance, she would not register it. The plaintiff agreed. This was at about 11 a.m. DW2 then prepared the Form 14A and they went to the Assistant District Officer's office at 2 p.m. for the plaintiff to thumbprint it.

According to the defendant, before the plaintiff left for Mecca, he took another RM1,500 on 16 May 1983 and in Mecca, he took another RM3,000 on 18 September 1983. On his return from Mecca, the plaintiff took another RM9,000 on 10 January 1984 and RM20,000 on 15 February 1984. In the meantime, the defendant said that she had never attempted to register the transfer as promised although she had ran up a bill of RM3,975 in her application to subdivide it. The balance was to date RM36,500 and not RM37,000 but she did not check when asked for that amount by the plaintiff's solicitors. She denied agreeing to pay the whole balance after the transfer on 7 May 1983. She also agreed under cross-examination that she did not pay the RM37,000 balance seven days after receiving the letter as she had gone to discuss the matter with one of the partners of the plaintiff's solicitor's firm.

DW2 said he was not related to either party but was familiar with both parties and the agreement they had entered into. He said he witnessed all the payments (except the one in Mecca) and typed the acknowledgements. He also said that on 7 May 1983, the plaintiff did not refuse the RM10,000 which was given before the execution of the transfer form. He further stated that the amount of RM135,000 on the transfer form was filled by the Assistant District Officer who had also explained it to the plaintiff.

Learned Counsel for the defendant submitted that 7 May 1983 was the cut off point as when the plaintiff signed the Form 14A, he had waived his right to forfeit under this agreement. His subsequent conduct is also testimony to this. Learned Counsel for the plaintiff argued that the cut off point was 25 May 1983 which was one year after the date of the agreement. I agreed with Counsel for the plaintiff as to the cut off date but held that there had been waiver on the part of the plaintiff as his conduct then had led the defendant reasonably to believe that the legal rights set out in the agreement could not be insisted upon. On that date, he had already signed on the Form 14A effecting the transfer of the said land and had received a total of RM66,500 spread out over the year in differing amounts. He further continued to accept further payments from the plaintiff amounting to RM32,000 up to 15 February 1984 which only strengthens the fact of the waiver. Suddenly out of the blue in August 1984 he had decided to sue the defendant.

Learned Counsel for the plaintiff conceded to the waiver but stated that in view of the plaintiff's solicitor's letter stated 18 July 1984, it had been revived following the case of *Charles Rickards Ltd. v. Oppenhaim.* [1950] 1 KB 616. There the facts were quite different as the plaintiffs, having originally contracted to supply the defendant with the body of a motor chassis within six or seven months, failed to do so. The defendant then waived that stipulation. Then after a further three months he pressed them for delivery but did not get it. He then sent a notice giving them four weeks' grace and threatened to cancel the contract if it was not delivered. It not being delivered, he cancelled the contract. The Court held that he was entitled to do so. It is clear from that case that the plaintiff had not done anything at all on their part. Here it was a case of sporadic payments by the defendant over a period of time and it is not disputed that the plaintiff accepted all payments made by the defendant from 25 May 1982 to 15 February 1984. The plaintiff had also given further time to the defendant to pay the balance in October 1984. It is only through the plaintiff's solicitor's letter dated 18 July 1984 and the subsequent filing of the suit in early August 1984 that the defendant became aware of the plaintiff's so-called revival of his rights. The solicitor's letter gave seven days to pay; its sudden appearance in that manner considering the conduct of the plaintiff before that and the subsequent agreement as to the payment between the parties after the cut off date was to my mind too short a notice and was not reasonable; and the defendant had also explained that she could not comply with it as she had gone to discuss the matter with the plaintiff's solicitors. She did subsequently give two cheques totalling RM37,000 in September 1984 but they were rejected by the plaintiff's solicitor. In the circumstances, I was of the view that the plaintiff thought differently on the matter at too late a stage thus making his attempt to revive the agreement an exercise in futility. I would go on to say that in rejecting the cheques for the balance, they had certainly made a mountain out of a molehill taking into account the relationship of the parties, his waiver on the agreement, his signing of the transfer form, his subsequent conduct and the fact that the defendant did not attempt to register the transfer despite the lapse or time. Learned Counsel for the plaintiff had submitted that on 15 February 1984, which is the last date the defendant is at liberty to register the Form 14A signed by the plaintiff on the 7th but there is nothing in evidence to support or suggest this.

As regards waiver, it is also necessary to distinguish the facts of this case to the other two cases quoted by learned Counsel for the plaintiff - in *Lew Yew Hin v. Kow Lup Piow* [1974] 1 MLJ 114, where the deposit and part payment was forfeited as the balance of the purchase price was not paid on the agreed due date, that case went on the application to rescind the contract based on the alleged misrepresentation of the vendor to the agreement and the Court found that the purchaser had breached the agreement by not paying on the due date after

holding that there had been no misrepresentation. In *Siah Kwee Mow & Anor. v. Kulim Rubber Plantations Ltd.* [1979] 2 MLJ 190, the plaintiffs claimed that the defendants were in breach of certain clauses of the agreement and the one month extension by the defendants amounted to a waiver. Apart from holding that there was no breaches on the part of the defendant or even if there were, they were not fundamental, the trial Judge also held that the extension of time did not waive the time stated in the agreement and was still of the essence. I would agree that an extension of time does not necessarily amount to a waiver - in that case there was only one extension for one month. In the present case, there had been several extensions running over a period of a year coupled with the fact that the plaintiff had also agreed to the transfer of the land even before the first year was up.

Holding that the time limit for payment in the agreement had been waived and never revived by the plaintiff, I accordingly dismissed prayers 1, 2, 3, 5 and 6 of his claim. For prayer 4, I awarded him the purchase price balance of RM36,500 (not RM37,000) together with interest and costs. On the counterclaim, I granted the defendant the order as prayed in prayer 3 (except that the amount is RM36,500 and not RM37,000) but find it not necessary to make any order for prayers 1 and 2, as the defendant is at liberty to register the Form 14A signed by the plaintiff on 7 May 1983, or for prayers 5 and 6. In view of the facts, I also made no order as to costs on the counterclaim. To enable her to register the transfer, I also gave her an order in terms of her prayer 4 of the counterclaim.

Also found at [1988] 2 CLJ 662